

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

MARY BAYES AND PHILIP)	
BAYES,)	
)	
Defendants,)	
)	
v.)	No. 4:13-CV-00800-SRC
)	
BIOMET, INC., BIOMET)	
ORTHOPEDICS, LLC, BIOMET)	
U.S. RECONSTRUCTION, LLC,)	
BIOMET MANUFACTURING, LLC)	
F/K/A BIOMET MANUFACTURING)	
CORP.,)	
)	
Defendants.)	

PRETRIAL CONFERENCE
BEFORE THE HONORABLE STEPHEN R. CLARK
UNITED STATES DISTRICT JUDGE

SEPTEMBER 24, 2020

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PROCEEDINGS RECORDED BY MECHANICAL STENOGRAPHY
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Bayes, et al. v. Biomet, Inc., et al. | 4:13-CV-00800

SEPTEMBER 24, 2020

(The proceedings commenced at 2:06 p.m.)

THE COURT: Good afternoon, everyone. It's nice to see you all in person as opposed to on video.

We are here in the case of Bayes v. Biomet No. 4:13-CV-800-SRC. We have a full courtroom, so I am going to have the lawyers introduce themselves starting with the lawyers for the plaintiff.

MR. SCHANKER: Good afternoon, Your Honor. My name is Darin Schanker and I represent the Bayes, Mary and Philip. I have the rest of my team here. And I'll let them, with your permission, go ahead and introduce themselves.

THE COURT: Very well.

MR. WOOL: Good afternoon, Your Honor. Zachary Wool, W-O-O-L, for the plaintiffs.

MR. ELLIOTT: Chris Elliott, Your Honor, for the plaintiffs.

THE COURT: Thank you, Mr. Elliott.

MS. PEREZ: Good afternoon, Your Honor. Jessica Perez Reynolds for the plaintiffs.

MS. SULKIN: Good afternoon, Your Honor. Melanie Sulkin for the plaintiffs.

MR. SCHANKER: Your Honor, I have staff here too. I'm not sure if you want --

THE COURT: Please.

Bayes, et al. v. Biomet, Inc., et al. | 4:13-CV-00800

1 **MR. SCHANKER:** Jennifer Dougherty. And that's it
2 here, Your Honor.

3 **THE COURT:** Very good. Thank you.
4 All right. For the defendants.

5 **MR. MANDLER:** Good afternoon, Your Honor. My name
6 is John Mandler, representing the Biomet defendants, and I am
7 here with the team. I will let them likewise introduce
8 themselves.

9 **THE COURT:** Very good. Thank you, Mr. Mandler.

10 **MS. BUSBY:** Good afternoon, Your Honor. Adrienne
11 Busby for the Biomet defendants.

12 **MR. CAMPBELL:** Good afternoon, Judge. Andrew
13 Campbell for Biomet.

14 **MR. BOZARTH:** Troy Bozarth, Your Honor. Good
15 afternoon.

16 **THE COURT:** All right. Very good.

17 We've got a lot to cover today, so I'm just going to
18 start working through my list.

19 I understand you have all had an opportunity to meet
20 with our court staff and to work through a number of issues
21 with essentially the layout of the court. And conference
22 rooms, I understand you have been informed which conference
23 rooms you are going to have outside the courtroom and the
24 like. And if not, I will cover that.

25 One other person I should introduce is David Dean,

Bayes, et al. v. Biomet, Inc., et al. | 4:13-CV-00800

1 my law clerk here, sitting in the jury box.

2 So when you are speaking today, I'm going to ask you
3 to actually pull down your masks because that will make it
4 easier for Reagan, my court reporter, to get down everything
5 you're saying. And when we get to the point where I'm talking
6 about jury selection, I will explain a bit about that and how
7 we are going to need to make a clear record. It's going to be
8 a little bit of a challenge with all of the venire people
9 wearing masks, so I will -- like I said, I will explain that.

10 That said, I am going to cover trial logistics,
11 motions *in limine*, some other substantive issues and then I
12 have kind of an other "other" category of kind of
13 miscellaneous issues.

14 I have incorporated all of your requested items into
15 my list here. I am not addressing them necessarily in the
16 order in which you presented them to me. But I will get to
17 all of them and if I somehow miss one, I'm sure you all will
18 remind me. So we will go from there.

19 All right. So first *voir dire*. We are going to use
20 not this courtroom for *voir dire* but courtroom 3 North. It
21 will be open for you to go down there today and see it. It's
22 a larger courtroom. And the reason we are using that is
23 because we can fit 35 venire people down there and then eight
24 people per side. So you will have counsel tables down there
25 and you will have two counsel tables each.

Bayes, et al. v. Biomet, Inc., et al. | 4:13-CV-00800

1 So, for example, Plaintiffs, if you intend to have
2 Mr. and Mrs. Bayes there, they can be there, right. It's who
3 you have as your eight is up to you. But just know that you
4 get eight on the plaintiffs' side and you get eight on the
5 defendants' side. Same with you, who you have there is up to
6 you. But we are doing it down there and then we'll obviously
7 come up here for trial.

8 The procedure for questioning is I will ask the
9 questions. I will do all the preliminary kind of standard
10 basic questions. I'm going to have you submit to me, by no
11 later than 5:00 p.m. on September 30, questions -- proposed
12 questions that you'd like me to consider. I will then just
13 determine which of them I'm going to use or not or I may use
14 slightly different versions of what you have submitted. But I
15 will have all of essentially the basics, if you will.

16 And then also I need you to submit by the same date
17 and time a brief statement of the case, a joint statement that
18 you've agreed upon that I can read to the jury during
19 *voir dire* to explain essentially what the case is about.

20 So that should be, like I said, brief. I had you
21 give me a brief one for the questionnaire. And when I told
22 you, for the questionnaire, that was not going to be the one I
23 was necessarily going to use for *voir dire*, then if you are
24 all in agreement with that one, that's fine with me. It's
25 not -- it's not that big of an issue from my perspective. I

Bayes, et al. v. Biomet, Inc., et al. | 4:13-CV-00800

1 just want an agreed statement. I don't want it to be very
2 long. One page double-spaced max. That's it.

3 And then after I get through my questioning, I will
4 allow each side 20 minutes. So Plaintiff will get 20 minutes.
5 Defendant will get 20 minutes.

6 Then -- and we are there now, so I am going to tell
7 you in terms of making the record clear, so Reagan, my court
8 reporter, is going to be up in the witness stand, actually,
9 down in 3 North. So when you go down there, look at that and
10 be sensitive to where Reagan is going to be sitting. All
11 right. So that's number one.

12 Number two, it's going to be very difficult for
13 Reagan to hear venire people who are answering questions, you
14 know, especially from the back of the room. It's a large
15 courtroom. And we are going to have additional microphones in
16 there. But when you are asking questions, I need you to
17 essentially focus on one group at a time. So those folks who
18 are in the box down there, and then the folks that are -- next
19 move to the group that's in the next set of pews in the
20 courtroom, so to speak, and then to the next section and then
21 the next section, so that you are not kind of broadly
22 blanketing and having somebody in the far left corner and then
23 somebody in the far right corner speaking right after or,
24 worse yet, on top of each other.

25 So in other words, you really have to proceed in a

Bayes, et al. v. Biomet, Inc., et al. | 4:13-CV-00800

1 very logical fashion and then ask the questions in the fashion
2 essentially that I will be asking. You know, does anybody
3 know plaintiffs' counsel. Okay. Folks in the jury box.
4 Okay. Somebody raises their hand. Then I will ask that
5 person, tell me who you know and what's your relationship with
6 them.

7 So same way for you. That's how I expect you to be
8 conducting it so that Reagan can be getting that down. If
9 Reagan has a problem, she's either going to interrupt you or I
10 am going to interrupt you during your questioning. I'm sure
11 neither side wants that. I don't want to do it, but I am more
12 concerned with making a good record.

13 So make sure that you are doing that. And if you
14 have any questions about it that morning or if you have any
15 questions about it today, you are free to talk with Reagan
16 about that. Okay?

17 And then the manner in which all of this will go, in
18 terms of strikes and strikes for cause, I will entertain after
19 you all have done your questions. And I will make my
20 proposals of folks to strike for cause as well. We will
21 address that obviously outside of the presence of the venire
22 panel.

23 And then once we have determined those for cause,
24 then you can -- you will make your peremptory strikes. You
25 will get three per side. What I have you do is you just do

Bayes, et al. v. Biomet, Inc., et al. | 4:13-CV-00800

1 them based on the list.

2 And you can -- what we do in this court, you will
3 have a jury list that you will get that morning and then you
4 can make your strikes on that list and then I will read into
5 the record who is on and who is off and who struck whom so we
6 have a full record in the transcript of who struck whom.

7 But in terms of your strikes for cause, I don't -- I
8 am not going to sit on the bench and have you tell me them.
9 I'm just going to have you work through the list together. I
10 don't expect it's going to take long and -- I'm sorry -- your
11 peremptory challenges. And you will do those after we do the
12 strikes for cause.

13 I think that covers all the issues I had on
14 *voir dire*. Any questions on *voir dire*, Mr. Schanker?

15 **MR. SCHANKER:** Yes, Your Honor, if I may. A couple
16 of months ago you were kind enough to let us have a sort of
17 pre-pretrial conference, Zoom, and at that time, as I was
18 reviewing the record in preparation for this, you had
19 indicated that you would give us 30 minutes for questioning.
20 And I just -- and today you said 20. I wanted to see, with
21 the Court's permission, if we could have the additional time.
22 Obviously only if it's needed. Not use it if it's not needed.

23 **THE COURT:** Well, right. I recall saying that and I
24 know you want your time back. I did a criminal trial last
25 week and I gave each side 20 minutes. We were selecting more

Bayes, et al. v. Biomet, Inc., et al. | 4:13-CV-00800

1 jurors for that case than we are for this and it was a
2 criminal trial where somebody's liberty was at stake. Neither
3 side used the full 20 minutes. So I am going to stick with
4 20 minutes here.

5 We have a lot of things to do in this case and we
6 have a holiday as one of the days during this trial and so I
7 am going to keep the case moving along. Every -- that's
8 really a total of 20 minutes, right, ten for you and ten for
9 you. That all is going to count.

10 So I am going to go back to 20 minutes on that.

11 **MR. SCHANKER:** Thank you for clarifying, Your Honor.
12 Is that 20 minutes per side or --

13 **THE COURT:** Yes. Plaintiffs will get 20 minutes;
14 Defendants will get 20 minutes.

15 **MR. SCHANKER:** Then just a couple other questions
16 concerning hardships. Are you going to deal with hardships
17 prior to for-cause challenges just to make sure we vet those
18 out -- or prior to questioning -- so that we are not, you
19 know, spinning our wheels or how does Your Honor like to deal
20 with that?

21 **THE COURT:** I am going to deal with that essentially
22 during the selection and then for cause. You know, one of the
23 questions I'll ask is: Does anybody have any other reason
24 that I haven't already addressed why you should not serve on
25 this jury in this case?

Bayes, et al. v. Biomet, Inc., et al. | 4:13-CV-00800

1 In my criminal trial, I had a woman struggle to
2 stand up and she said, well, yesterday, Judge, I tore
3 ligaments in my leg and I'm in a boot and I'm on pain meds and
4 I'm on crutches and I am in excruciating pain and I don't
5 really think I can come through this trial. So I excused her
6 on the basis of a hardship. But I didn't do it right then and
7 there. I waited until cause. So it will -- that will be
8 developed during the *voir dire* questioning.

9 **MR. SCHANKER:** Excellent. And then you were kind
10 enough to let us submit potential questions for the
11 questionnaire that you sent out to the prospective jurors. I
12 just was wondering is that something we are going to be able
13 to view at all or how does that play out? Or was that just
14 for your purposes to vet through jurors on the --

15 **THE COURT:** Yeah, I thought I mentioned I'm going to
16 have you submit, by no later than the close of business on
17 Wednesday at 5:00, your proposed *voir dire* questions. I'm
18 going to look at them, I'm going to consider them, and I'm
19 going to use which ones I want or modified versions of which
20 ones I want. We're not going to argue about them.

21 **MR. SCHANKER:** I'm sorry. My question wasn't clear.
22 I was talking about the mailing that you sent out that jurors
23 responded to.

24 **THE COURT:** Oh, that's already been taken care of.
25 I mean, the folks that, based on that, were not able to serve

Bayes, et al. v. Biomet, Inc., et al. | 4:13-CV-00800

1 are not coming. The purpose of that was to reduce the number
2 of people coming into the courthouse in one sense and to
3 reduce the potential for anybody who has COVID issues, whether
4 it's themselves or they're caring for someone or what have
5 you.

6 **MR. SCHANKER:** Then just one more question on
7 for-cause challenges, which you explained. You said that
8 those will be dealt with after. Does that mean after both the
9 plaintiff and the defense have questioned, then you will take
10 the for-cause challenges at that point either -- and you'll
11 have a system set up, presumably not sidebar, we go in a
12 different room, we sit outside the presence of the jury and
13 we'll just figure that out at the time?

14 **THE COURT:** Right.

15 **MR. SCHANKER:** Thank you.

16 **THE COURT:** Thank you. Mr. Mandler, any questions?

17 **MR. MANDLER:** A couple, Your Honor. I know we may
18 have raised this in the earlier pretrial. And I didn't do my
19 homework, apparently, as well as Mr. Schanker because I don't
20 remember the answer.

21 What is your practice as far as the order of the
22 strikes? Do Plaintiffs do all of theirs and then the
23 defendants do all of theirs or is it an either/other one?

24 **THE COURT:** On your peremptory challenges?

25 **MR. MANDLER:** Yes, Your Honor.

Bayes, et al. v. Biomet, Inc., et al. | 4:13-CV-00800

1 **THE COURT:** Yeah. Really the way it works in this
2 district is you all typically kind of work that out. But if
3 you want me to -- to me it makes sense just every other one.
4 That's the default rule, unless you work something else out.
5 Okay?

6 **MR. MANDLER:** As long as I know the rule, we can
7 figure it out. Thank you, Your Honor.

8 **THE COURT:** All right. Sounds good.

9 **MR. MANDLER:** Couple of other questions. We did --
10 I think the parties did already submit a joint statement of
11 the case. So I want to make -- I was hoping to find the
12 docket number while I was sitting here but I couldn't put my
13 finger on it. So is that something different that you want
14 or --

15 **THE COURT:** Well, you did, but the one you did
16 submit was for the purposes of the questionnaire, for the jury
17 questionnaire that we sent out.

18 **MR. MANDLER:** I think we did both, but I'll --

19 **THE COURT:** If you have done another one, you know,
20 believe me, you filed enough that I can't say that I remember
21 everything, that I've committed each one to memory by docket
22 number. So if you have one, that's fine. You don't need to
23 send --

24 **MR. MANDLER:** Then in essence the same question on
25 our proposed instructions for you, not for the questionnaire

Bayes, et al. v. Biomet, Inc., et al. | 4:13-CV-00800

1 but I think we've -- at least the defendants have already
2 submitted something. We will take a look at it and if it's
3 okay, we'll -- if we have more, we will do it by the deadline.
4 Otherwise, we will stand on what we already gave you.

5 **THE COURT:** Well, I am not looking for more. If
6 you've already submitted, you've already submitted them.

7 **MR. MANDLER:** Thank you, Your Honor.

8 **THE COURT:** All right. Thank you. So we talked
9 about in the -- the number of folks in the courtroom down
10 on 3. The number of folks in the courtroom here, you've
11 already gone over, I believe, with Ms. Miller Young and
12 Ms. Olliges.

13 One question that I think arose was how many
14 people -- Plaintiffs, are you going to be able to have Mr. and
15 Mrs. Bayes there with you at counsel table? You may have four
16 at the two counsel tables. You know, the main counsel table
17 here that you're at, Mr. Schanker, and the main counsel table
18 you are at, Mr. Mandler. The table in the middle, one each,
19 you know, one per side.

20 So we will put up additional plexiglass on these
21 tables to accommodate four people. I know you have four
22 people that are now today on the defendants' side. And
23 that's -- that will inform how many people you have elsewhere
24 in the courtroom.

25 Once we get all the jurors seated, we will have 12

Bayes, et al. v. Biomet, Inc., et al. | 4:13-CV-00800

1 extra spaces, if you will, in the courtroom. So what I am
2 going to do is allocate four of those to Plaintiff, four of
3 those to Defendant and four for the public. And we are going
4 to keep the four for the public open as long as we need to
5 keep them open.

6 If it turns out that there's nobody coming in and
7 out of here, the public, I may say, okay, well, each side may
8 have one more or something like that. But I am not going to
9 prejudge that today. If there's, for example, somebody who is
10 going to be coming every day, the public is entitled. This is
11 a public proceeding.

12 Then the other piece of that puzzle is in the
13 conference rooms. There's three conference rooms immediately
14 outside my courtroom, three conference rooms outside of Judge
15 Schelp's courtroom, which is Courtroom 14 South, so the one
16 immediately opposite me. And so the plaintiff, you will get
17 the three conference rooms on my side, on the 14 North side.
18 Defendants, you get the three conference rooms on the 14 South
19 side.

20 And we are going to -- because I suspect you are
21 going to have part of your trial teams in those rooms, we are
22 going to allow folks in those rooms but on those rooms only to
23 observe the trial by Zoom. They need to have their mics off
24 and their cameras off. I don't really want to see what's
25 going on in their rooms, frankly, and -- but that's it in

Bayes, et al. v. Biomet, Inc., et al. | 4:13-CV-00800

1 terms of who is going to be observing the trial by Zoom.

2 They will also have realtime transcripts, realtime
3 transcription going or rolling reporting in those rooms as
4 well. But again only those rooms.

5 And I -- it kind of raises to me another issue,
6 which is sequestration of witnesses. I assume one or both
7 sides are going to be seeking sequestration of witnesses; is
8 that right?

9 **MR. SCHANKER:** I'm sure, Your Honor, that will come
10 up. I would imagine that's going to be the case.

11 **MR. MANDLER:** Yes, Your Honor. Fact witnesses.

12 **THE COURT:** Okay. So with that, that's the other
13 concern I have about, you know, having the others participate
14 by Zoom because it just gets a little unwieldy. So what you
15 are going to need to do then, I assume you are going to use
16 one of the rooms for witness prep, so you're going to need to
17 set up one of those rooms and not have Zoom going in that room
18 so you can use that as your witness prep room.

19 **MR. MANDLER:** That makes sense, Your Honor. One
20 other question on those, simply, if I may, Your Honor.

21 **THE COURT:** Yes.

22 **MR. MANDLER:** If we bring it in ourselves, are we
23 permitted to bring in a printer for one of those rooms?

24 **THE COURT:** Yes. I think somebody asked about
25 bringing in a copier. That's fine. Just coordinate with

Bayes, et al. v. Biomet, Inc., et al. | 4:13-CV-00800

1 Ms. Miller Young on those kind of things because you'll need
2 to get those through security. Because if you walk into
3 security with a big box, you know, and haven't precleared it,
4 that's going to be a problem. You don't want to have that
5 problem.

6 And I think someone had asked if you are going to be
7 able to set things up in the courtroom and in the conference
8 rooms the week before. That's fine. You can start coming in.
9 I think -- Lori, did we talk about doing that on -- allowing
10 them to come in starting on Thursday?

11 **MS. MILLER YOUNG:** Yes, they can -- I'll e-mail the
12 attorneys in the case and then they can just let me know when
13 they want to come in.

14 **THE DEPUTY CLERK:** They are coming in Monday for a
15 dry run and they asked if they could bring some things in the
16 courtroom and I said what they are going to set up for IT. I
17 said that was okay because you don't have anything.

18 **THE COURT:** That's fine. I don't have anything
19 scheduled in my courtroom next week. So Chelsea O. was just
20 telling me that somebody is coming in Monday for some things
21 and you are going to bring things in then. That's fine. Get
22 your things set up. I want you ready to go on Monday,
23 October 5. So have everything set up best you can before --
24 before Monday, October 5, frankly.

25 And just continue to work with Chelsea O. and

Bayes, et al. v. Biomet, Inc., et al. | 4:13-CV-00800

1 Ms. Miller Young on this. Okay? The reason I'm calling
2 Chelsea O. "Chelsea O." is my paralegal is Chelsea L. and she
3 is back in chambers right now. So there's two Chelseas. So
4 that said, like I said, continue to work with them.

5 This is kind of a practical issue, but breaks are
6 going to be a little longer. Usually we take a ten-, maybe
7 15-minute break midmorning and ten-, maybe 15-minute break
8 midafternoon, but they are probably going to be closer to
9 20 minutes, maybe even a couple minutes longer than that. The
10 reason is that half the jury is going to be using my jury room
11 as their break room. The other half of the jury is going to
12 be using Judge Schelp's jury room as their break room. So
13 Chelsea O. is going to have to get one group, bring them in,
14 go get the other group, bring them in. It just takes a little
15 longer, right?

16 So that said, in terms of -- to the extent we have
17 business that we need to take care of outside of the presence
18 of the jury during those breaks, we are going to do it
19 immediately after the jury leaves the courtroom as opposed to
20 waiting until the end of the break and then bringing them back
21 in. So we will address those, you know, outside the presence
22 of the jury issues immediately after the jury leaves the
23 courtroom.

24 Is that clear?

25 **MR. MANDLER:** Yes, Your Honor.

Bayes, et al. v. Biomet, Inc., et al. | 4:13-CV-00800

1 **THE COURT:** Okay. Very good.

2 Plaintiffs, you had requested an overflow courtroom.
3 I'm unable to do that, so I've given you kind of what I am
4 doing, so that should cover it.

5 **MR. SCHANKER:** Thank you.

6 **THE COURT:** And then I think you asked about leaving
7 things in the conference rooms and in the courtroom. You may
8 do so. We take no responsibility for ensuring the safety and
9 security of it. The courtroom and the conference rooms will
10 be locked in the evening by the courthouse security officers,
11 so they will be locked. And obviously it's a very limited
12 access building. But I am not the guarantor of the safety and
13 nor is the federal judiciary the guarantor of the safety and
14 the security of your items that you leave behind. So I'll
15 leave it to your discretion what you want to leave behind.
16 But you may do that.

17 Then with respect to the number of jurors, I expect
18 to seat ten jurors. And if all ten of those jurors make it
19 all through the trial, all ten of them will deliberate.

20 With respect to opening statements and closing
21 arguments, my rule is 20 minutes per side. I don't recall
22 seeing a request by either side for additional time on that,
23 but that's possibly --

24 **MR. MANDLER:** I think we did request. I think we
25 asked for 40 minutes per side if I remember right.

Bayes, et al. v. Biomet, Inc., et al. | 4:13-CV-00800

1 **THE COURT:** Now that you say that, I do recall
2 seeing that.

3 **MR. SCHANKER:** And I just reviewed the transcript,
4 Your Honor. And you had indicated -- we had actually asked
5 for 45 and you had said that was -- you were comfortable with
6 that in this case.

7 **THE COURT:** Okay. So I will give you 45 minutes per
8 side, but I will tell you this. I will hold you strictly to
9 it. And when your 45 is up, your 45 is up. And you are going
10 to be sitting down and you are going to be finished whether
11 you are finished with what you want to say or not. So I have
12 to hold you to tight timelines on this.

13 **MR. MANDLER:** Thank you, Your Honor.

14 **THE COURT:** I do that regardless.

15 All right. Mr. Schanker, you requested a deadline
16 for the exchange of opening statement visuals. I think that
17 makes sense. Have you all discussed that and agreed on
18 anything?

19 **MR. SCHANKER:** Your Honor, we have discussed that.
20 And you also made sort of a proposal or an idea with -- based
21 on you didn't know at the time whether the trial would start
22 on a Monday or a Friday. I believe that what the proposal was
23 and then kind of what our thought process was that you
24 indicated if we got -- hopefully we can work everything out
25 and there won't be anything to submit to you. But if there

Bayes, et al. v. Biomet, Inc., et al. | 4:13-CV-00800

1 was, that we could get it to you on the Thursday before trial,
2 perhaps by noon.

3 And then Friday if we could have back from you your
4 thumbs up, thumbs down on those issues so that we could have
5 the weekend understanding what the opening statement would be,
6 which then would back up to us just having to submit those to
7 each other, you know, ahead of time so that if there's any
8 disputes, Your Honor, we submit those to you on the Thursday
9 prior to trial to be resolved by the Friday prior to trial.
10 So we would need to confer on this next week.

11 **THE COURT:** All right. Do you have any thoughts on
12 that now, Mr. Mandler?

13 **MR. MANDLER:** I thought I was following it until we
14 got to the end and then I'm not certain what the first part
15 is. I thought the proposal was that on Thursday at noon, so
16 it would be the 1st, we would exchange and then if there's
17 issues, we would bring them to your attention the following
18 day if you're available and resolve them prior to opening.

19 So I wasn't certain what's happening before that in
20 Mr. Schanker --

21 **MR. SCHANKER:** All I wanted to do was give His Honor
22 some time to resolve so that if there were any disputes, we
23 give them to you on a Thursday and then they can be resolved
24 by Friday was the only distinction that I --

25 **MR. MANDLER:** The Thursday and Friday before trial,

Bayes, et al. v. Biomet, Inc., et al. | 4:13-CV-00800

1 so the 1st and the 2nd?

2 **THE COURT:** Right. So from my perspective, it would
3 be preferable if you submitted them by Wednesday, the 30th at
4 noon.

5 **MR. SCHANKER:** We will do that.

6 **THE COURT:** And then by Friday I can give you my
7 ruling on any issues that are disputed, if there are.
8 Hopefully you can work them all out. But let's make that by
9 noon on Wednesday, the 30th.

10 **MR. SCHANKER:** That works.

11 **MR. MANDLER:** To submit them to the Court so we'll
12 have to work out amongst ourselves how much in advance we give
13 them to each other?

14 **MR. SCHANKER:** Correct.

15 **THE COURT:** Right. That will be up to you.

16 **MR. MANDLER:** Just because I believe in clarity, I
17 want to make sure what it is that we are exchanging. So for
18 my opening I use slides. What I propose we exchange are those
19 that are demonstratives, that are showing something. But my
20 slides where it's bullet points of what I'm saying, I would
21 propose we don't exchange those because that's basically
22 saying what my opening is.

23 And I just don't want there to be any complaints or
24 confusion later. Anything that is a demonstrative that's
25 showing something we'll exchange.

Bayes, et al. v. Biomet, Inc., et al. | 4:13-CV-00800

1 **MR. SCHANKER:** That's fair enough.

2 **MR. MANDLER:** Thank you.

3 **THE COURT:** So it shall be.

4 All right. For the -- here's what I expect at this
5 point in terms of kind of start time, finish times, things.
6 But this is in part subject to what the jury wants to do. You
7 know, when we have trials down in our courthouse in Cape
8 Girardeau, a lot of times the jurors want to stay until
9 6:00 or 7:00 to keep going because a lot of them have to drive
10 over an hour to get to the courthouse. We don't have that as
11 much here.

12 But, you know, if I have somebody who has got quite
13 a lengthy drive, you know, we'll have to address that and deal
14 with it. But my anticipation is that we will start with the
15 jury at 9:00 a.m. and conclude somewhere between 5:00 and 5:30
16 and then -- so in terms of your arrival time, though,
17 Mr. Schanker and Mr. Mandler, I am going to need you here by
18 8:15 every morning ready to go, talk to me. Not in here
19 getting set up, but ready to talk to me about anything we need
20 to talk about.

21 And I will say that's the general rule, except for
22 when I say otherwise. And I may say otherwise depending upon
23 what we do and when we start about your objections to the
24 deposition testimony, you will understand where I'm going with
25 that.

Bayes, et al. v. Biomet, Inc., et al. | 4:13-CV-00800

1 But that said, on Monday, October 5, though, I need
2 both of you here and ready to talk to me at 8:00 because I
3 suspect we will have some issues that we need to cover then
4 and probably a few more than usual.

5 Kind of, I guess, a fair warning for you all, I tend
6 to be up with the crows and so I don't mind getting here
7 earlier than that. So I may -- I'll just tell you I may have
8 you get here at 7:00 some mornings. So just be prepared to
9 set your alarm clocks accordingly. And believe me, I know
10 what it's like when you're trying cases. You generally don't
11 get a lot of sleep and I'm certainly not trying to deprive you
12 of more sleep because having sleep-deprived lawyers is
13 generally not a good thing. But, you know, "we have a long
14 way to go and a short time to get there," as they say, and we
15 are going to make sure it all gets done.

16 **MR. MANDLER:** Thank you, Your Honor.

17 **THE COURT:** I suspect, as I mentioned to you at the
18 August 27 conference, that we are going to take some witnesses
19 out of order because now the trial is starting on October 5
20 and because of COVID. And I know there's an issue with
21 Mr. Schroeder in Switzerland, and we will talk about that in a
22 few minutes. But tell me from the plaintiffs' perspective, do
23 you have witnesses that are going to go out of order?

24 **MR. SCHANKER:** No, Your Honor. We don't believe
25 that any will need to go out of order.

Bayes, et al. v. Biomet, Inc., et al. | 4:13-CV-00800

1 **THE COURT:** All right. Very good. How about you,
2 Mr. Mandler?

3 **MR. MANDLER:** Well, we have some witnesses with
4 scheduling issues. Whether that means they are out of order
5 or not will kind of depend on if they are being called in
6 Plaintiffs' case. And we had started those discussions with
7 Plaintiffs. I think they had subpoenaed at least one of our
8 witnesses, Jing Xie, J-I-N-G, X-I-E, to testify during their
9 case and there will be some scheduling things we have to work
10 out with them.

11 **THE COURT:** Okay. So talk with each other. And
12 when we talk about the deposition testimony issue, I will tell
13 you a little bit more about that, but my intention is that
14 each witness is only going to be called to the stand once. So
15 I don't anticipate witnesses coming back to the stand multiple
16 times.

17 So if one of the defendants' witnesses is called
18 during Plaintiffs' case, then you put on whatever other
19 evidence through that witness you intend to put on and get
20 that witness on and off the stand. I mean, from a trial
21 management standpoint, from a reducing the number of people
22 coming in and out of the courthouse standpoint, that's to me
23 the best way to do it.

24 **MR. MANDLER:** Yes, Your Honor.

25 **THE COURT:** Okay. Now, the -- I've got -- what I'm

Bayes, et al. v. Biomet, Inc., et al. | 4:13-CV-00800

1 about to say is kind of subject to further consideration
2 because there's some courthouse security issues involved in
3 this, but there's two issues. One is disclosure of witnesses.
4 Disclose your witnesses to each other two business days in
5 advance by 8:15 a.m. So your witnesses for Wednesday
6 disclosed by Monday at 8:15 p.m.

7 Now, obviously your witnesses for the first day of
8 trial and the second day of trial you are going to need to
9 disclose before trial begins, you know, the week before. And
10 then disclose also whether the witness is appearing in person
11 or by Zoom and the related issue, which I will address now, is
12 the deposition designations. You've designated a whole bunch
13 of deposition testimony that you intend to submit at trial.

14 I think the question was also posed, and I believe
15 we addressed this a little bit at one of the other pretrial
16 conferences, and that is, is the witness going to be permitted
17 to testify both by deposition and live and the answer is no.
18 A witness may testify once and only once as I've said and it's
19 not -- you are not going to be able to do both.

20 The other issue is the objections. And frankly, I
21 am disappointed with what you gave me because it's a list of
22 hundreds and hundreds and hundreds and hundreds of objections.
23 And I'm not sure exactly what you expected me to do with that
24 in advance of trial. If you thought I was going to be able to
25 sit down and go through each one of them and rule on them,

Bayes, et al. v. Biomet, Inc., et al. | 4:13-CV-00800

1 that's not going to happen.

2 So two things, Mr. Schanker and Mr. Mandler, knowing
3 how these things work in big trial teams, my guess is neither
4 of you pored over that list in great detail. If I'm wrong,
5 I'm wrong. I don't need you to tell me I'm wrong, that's
6 fine. Regardless, I'm ordering the two of you to meet and
7 confer on that and work out those objections. And I'm going
8 to give you an incentive to work out those objections.

9 And that incentive is this: If you don't work them
10 out, the ones you don't work out, we are going to have to deal
11 with each evening after trial concludes, after the jury goes.
12 And I am going to take a break, so it's not going to be right
13 after and we're going to need to hash through all of them for
14 those witnesses. And initially I was thinking we would just
15 do it -- you know, tomorrow's witnesses we will do today, but
16 I don't think that's going to work because if you are going to
17 present them by video and you need to do some video editing,
18 you are going to need a little time.

19 So what I was thinking was essentially, again, two
20 business days ahead. So on Monday evening, we are going to
21 address any witnesses that are going to be presented by
22 deposition or any deposition testimony that's going to be
23 presented for Wednesday.

24 And we are just going to have to kind of go through
25 that. Now, that's why I said there's one issue with that with

Bayes, et al. v. Biomet, Inc., et al. | 4:13-CV-00800

1 courthouse security. So I may have to do that kind of -- I'm
2 going to have to figure out exactly when and how much time we
3 are going to have to do that each evening. And then the other
4 alternative is we start early in the morning and do it.
5 Again, two days before. And that may be where we need to be
6 here at 7:00 a.m.

7 So I haven't figured that out yet exactly when
8 that's going to happen, you know, is it necessarily going to
9 be each evening or is it going to have to be some evenings and
10 some mornings. I don't know yet. But it's going to be --
11 it's not going to be before trial essentially, it's going to
12 be during trial on a rolling basis.

13 Also I realize that as trial goes on, you may decide
14 some witnesses you're not going to need or you don't want to
15 testify. So I'm not going to spend a whole lot of time and
16 burn a lot of calories on issues that I may not need to deal
17 with.

18 But as I say, my incentive to you is to work that
19 out. That will save you some time during the trial days or
20 trial evenings so you can go be preparing for the next day.

21 And so let me ask you, Mr. Schanker: Do you
22 anticipate within the first two days of trial that any of your
23 testimony is going to be presented by deposition?

24 **MR. SCHANKER:** Yes, Your Honor, we do.

25 **THE COURT:** Okay. So then you need to have that

Bayes, et al. v. Biomet, Inc., et al. | 4:13-CV-00800

1 worked out. Work through as many of those and boil down to
2 the essential objections you want me to rule on before trial.
3 So have that submitted to me and that one I'll do by noon on
4 October 1. And I will -- I can't tell you -- make a
5 commitment right now as to when I'm going to rule on those
6 issues, but I will get your rulings before you have to present
7 those witnesses or present that evidence.

8 **MR. SCHANKER:** We will do that, Your Honor.

9 **THE COURT:** The other issue on that is -- some of
10 these things are in my judge's requirements, so I'm just
11 amplifying a few of these. But the -- so Reagan, my court
12 reporter, does not transcribe video depositions as you are
13 either reading or playing them, so you need to, at the end of
14 each day, submit a document stating these are the pages and
15 lines of the transcript of this witness that were presented to
16 the jury and then you need to, along with that, file that
17 witness' -- certified copy of the witness' deposition
18 transcript so that it's in the record.

19 And if you want to file just the excerpt of the
20 deposition transcript, that's fine. I don't care about that,
21 whether it's the whole transcript or the excerpts. It's
22 really a question of making sure that we have those two
23 things, number one, a listing of what portions of the
24 transcript are in the record and, number two, then the actual
25 transcript so that it is in the record for purposes of the

Bayes, et al. v. Biomet, Inc., et al. | 4:13-CV-00800

1 completeness of the record.

2 Does that all make sense?

3 **MR. SCHANKER:** Yes, Your Honor.

4 **MR. MANDLER:** Yes, Your Honor. In the last trial I
5 had in the Eastern District in front of Judge Limbaugh, we
6 filed what were basically clip reports. Each side shared
7 them, signed off on them and then once they were agreed,
8 that's what was filed. It's the actual thing that was read.

9 **THE COURT:** I've seen those, yeah. So that's fine.
10 That works for me. Like I said, as long as what's in the
11 record is at a minimum what was presented, you know, to the
12 jury, that's fine. If more is presented, then I just need a
13 clear record on what portions of the more were presented to
14 the jury and, you know, kind of by negative inference what
15 weren't.

16 **MR. MANDLER:** Thank you, Your Honor.

17 **THE COURT:** All right.

18 **MR. SCHANKER:** Your Honor, if I may. And if this is
19 not the right time, I will ask later. Just a brief
20 clarification question on the use of video deposition
21 testimony.

22 Some of these witnesses, not many, but just a few of
23 them were 30(b)(6) deponents and then also taken in a personal
24 capacity. And if it is a 30(b)(6) video, are we permitted to
25 show that 30(b) -- I'm assuming we are permitted to show the

Bayes, et al. v. Biomet, Inc., et al. | 4:13-CV-00800

1 30(b) (6) video pursuant to the Federal Rules of Civil
2 Procedure even if that witness is coming in live to testify
3 because it's obviously the distinction between speaking on
4 behalf of the corporation versus individual.

5 **THE COURT:** I know your argument is that Rule 30
6 permits for any purpose and -- but I haven't seen anything
7 that says Federal Rule of Evidence 611 does not trump Rule 30
8 of the Federal Rules of Civil Procedure and Federal Rules of
9 Evidence 611 gives me discretion as to the order and
10 presentation of witnesses and I'm not going to allow you to
11 present video of a witness who is going to be here live.

12 So if it's somebody who's coming -- you know, John
13 Doe is coming and he testified as a corporate representative,
14 if he is testifying live, you are not going to also play his
15 corporate representative testimony. You're going to elicit
16 from him on the stand what evidence you intend to elicit from
17 him.

18 **MR. SCHANKER:** Thank you.

19 **THE COURT:** Okay. So on the topic of witnesses,
20 remote witnesses by Zoom, how many witnesses do you anticipate
21 and how frequently do you anticipate witnesses testifying
22 remotely? Mr. Schanker first.

23 **MR. SCHANKER:** We may have one or two by Zoom, but
24 we believe the rest will be coming in person, Your Honor. And
25 I did have one question concerning those Zoom witnesses.

Bayes, et al. v. Biomet, Inc., et al. | 4:13-CV-00800

1 As you referenced earlier in the time period of the
2 notification of live versus Zoom and the only question I had
3 concerning that is if we don't know if a witness is testifying
4 via Zoom or live and we want to have that witness with some
5 documents there with them to be reviewing, I am just concerned
6 that not knowing a witness is testifying via Zoom until that
7 late day will cause a significant problem with the
8 presentation.

9 **THE COURT:** So what are you suggesting?

10 **MR. SCHANKER:** Wondering if we can bump that from --
11 I believe it was 48 hours, if we can move that back a few more
12 days?

13 **THE COURT:** Two business days. So that weekends you
14 are not dealing with it that way.

15 **MR. SCHANKER:** Sure. Right.

16 **THE COURT:** Mr. Mandler, what do you think about
17 that?

18 **MR. MANDLER:** I think that's fine. I think we are
19 ready to disclose the ones we are doing by Zoom right now.
20 I'm happy to share those with counsel so there's no surprise.

21 **THE COURT:** If you want to disclose them all in
22 advance, that's fine with me. Are you prepared to do that,
23 Mr. Schanker?

24 **MR. SCHANKER:** We will talk about it and set some
25 dates. Again, it's not about tricks or anything like that.

Bayes, et al. v. Biomet, Inc., et al. | 4:13-CV-00800

1 It's just making sure that we can run the trial smoothly.

2 **THE COURT:** If you agree on disclosing things to
3 each other sooner than I've ordered you to do so, you may do
4 so. That's fine with me.

5 **MR. SCHANKER:** Thank you. That's not what I'm
6 concerned about. I just want to make sure those witnesses
7 have the documents they need so we can --

8 **THE COURT:** I get it. No, I get it. Obviously when
9 somebody is here in person, you can just deal with the
10 exhibits. When they are not, you have to make other
11 arrangements. I get it.

12 **MR. SCHANKER:** Well, thank you, Mr. Mandler. We
13 will work that out.

14 **MR. MANDLER:** One other question on the Zoom
15 testimony.

16 **THE COURT:** Sure.

17 **MR. MANDLER:** We had been planning on having an
18 attorney with the remote Zoom person, not the person who is
19 questioning who will question from here. And that person
20 wouldn't be doing anything other than sitting there and making
21 sure the technology so is okay and making sure that the
22 exhibits are okay and -- you know, for example, one will have
23 to testify from one of our remote offices, but we want to make
24 sure there's no objections to that.

25 **MR. SCHANKER:** No, Your Honor. Obviously, you know,

Bayes, et al. v. Biomet, Inc., et al. | 4:13-CV-00800

1 same rules apply. We assume we both will follow those as far
2 as sequestration and everything else.

3 **THE COURT:** All right. Very good.

4 Couple more quick things I want to hit on and then I
5 want to take a quick break. Is it David Schroeder or
6 Schroeder?

7 **MR. MANDLER:** Schroeder, Your Honor.

8 **THE COURT:** He is in Switzerland. And you all have
9 asked for two business days' notice of when -- if the
10 plaintiff is going to call him, two business days so you can
11 make arrangements with time change and all of the things you
12 need to. That's fine with me. I think that's a reasonable
13 request. If you can work that out more days, great. I think
14 the more the better.

15 I will say this as just a blanket statement with
16 respect to any witness who is appearing by video
17 teleconference, make sure you test and test and test the
18 technology beforehand and vet that it works.

19 And Chelsea O. will be, I'm sure, more than happy to
20 work with you on that, obviously outside of trial time, but
21 make sure -- or we will have somebody else in the court who
22 does that instead of Chelsea O. But make sure you do that.
23 Because I really don't want any glitches. And I know they may
24 happen, but the more you test and the more you vet it and make
25 sure it works, the better off we are all going to be and the

Bayes, et al. v. Biomet, Inc., et al. | 4:13-CV-00800

1 more smoothly this is going to go. Okay.

2 All right. I'm going to take a quick break and I
3 will be back. So five minutes. Okay. So five minutes and we
4 will be back.

5 Court will be in recess. Thank you.

6 (At this time, the Court declares a recess.)

7 **THE COURT:** All right. Thanks, everybody. We
8 realized that we didn't have the Zoom set up and told we'd
9 have some Zoom. So welcome to the folks that are appearing by
10 Zoom.

11 All right. So picking right up, we were talking
12 about a number of things. I was starting to get to exhibits.
13 So just probably something you're already used to, but the
14 exhibits are not going to be published to the jury until they
15 have been admitted into evidence or until you've stipulated to
16 them.

17 So the -- I assume you are primarily going to be
18 using electronic exhibits and displaying them via laptops or
19 what have you as opposed to using the evidence camera; is that
20 right?

21 **MR. MANDLER:** Yes, Your Honor.

22 **MR. SCHANKER:** Yes, Your Honor.

23 **THE COURT:** All right. To the extend you need to
24 use the evidence camera, if you do, it's going to be available
25 for you. It's actually tucked in under on the lecturn there

Bayes, et al. v. Biomet, Inc., et al. | 4:13-CV-00800

1 and it pulls out. If you use it, then we will have wipes in
2 here, but you are going to be responsible for cleaning it
3 before your use and after your use and what have you.

4 I want to circle back to another thing. The jury
5 list, what I addressed to your question, Mr. Schanker, was the
6 issue of prescreening people out for COVID, but then there's
7 another screen that you all will do. And so I am going to
8 need you to come in on Tuesday the 29th and meet with
9 Ms. Miller Young. And so you can make arrangements with her
10 as to what time you are going to do this and then you go
11 through and on that list you will ultimately come up with a
12 list, hopefully an agreed upon list, of people you believe
13 ought to be excused. And then I will review that and then I
14 will make those determinations by Thursday.

15 You won't necessarily know who and you're not going
16 to know names on that when you see it. You're not going to
17 have names or addresses. You're simply going to have what the
18 issue is. Then I am going to excuse those people so that by
19 Thursday, they can be notified that they don't have to come
20 down to the courthouse.

21 All right. Technology. You've already all, I
22 think, been working towards this in terms of training and kind
23 of making arrangements and logistics and all of that. You
24 have this dry run scheduled, one of you does. That's fine
25 with me. Just keep in mind -- I think you were going to --

Bayes, et al. v. Biomet, Inc., et al. | 4:13-CV-00800

1 some of you were going to have your tech people with you for
2 that. That's great. Our people will be here to kind of
3 facilitate any issues on our end of things. But, you know,
4 obviously, as you know, we are not responsible for any of your
5 technology issues. So -- but as you work through that, just
6 keep that in mind of essentially where that line is between
7 what our staff will be doing and what your folks will be
8 doing.

9 All right. I'm going to cover the motions *in limine*
10 now and give you my rulings. I have rulings on most of them.
11 A couple of them I'm going to be asking for supplemental
12 briefing on. But I'm just going to give you my ruling and
13 then to the extent necessary a brief bit of explanation and
14 that's it. I'm not looking for argument on these.

15 So -- and I'm going in the order of the numbers in
16 which they appear in your respective motion papers. So with
17 respect to Defendants' motions *in limine*, motion No. 1, which
18 essentially is other complaint files, claims and lawsuits, I
19 deny that motion *in limine* without prejudice and I'm requiring
20 an offer of proof that the prior incidences were substantially
21 similar. And then I am going to reserve ruling on the number
22 of prior incidents that would be admissible on the basis of
23 unfair prejudice or cumulative or the like.

24 In terms of when we do that offer of proof, that
25 is -- I think that's a timing issue that I need some guidance

Bayes, et al. v. Biomet, Inc., et al. | 4:13-CV-00800

1 from you on and I am not sure exactly what the best time to do
2 that is. If either of you has thoughts on that now or if you
3 want to confer on that. Would you prefer to confer on it,
4 Mr. Schanker?

5 **MR. SCHANKER:** Yeah, I think we should. Let us
6 confer and then we can let you know if we can't reach --

7 **MR. MANDLER:** That's fine, Your Honor.

8 **THE COURT:** Very good. All right. So Defendants'
9 No. 2, the M2a-Magnum marketing materials. So assuming that
10 the plaintiffs offer evidence that Biomet knew the M2a-Magnum
11 was dangerous or defective, marketing materials touting the
12 product safety or efficacy would go to show a conscious
13 disregard for public safety. So I am denying it as a blanket
14 prohibition on those materials, but I'll grant it insofar as
15 there is relevance to as -- insofar as there is no relevance
16 to punitive damages.

17 So to the extent you are seeking to offer that
18 material, Mr. Schanker, you are going to have to connect it up
19 to how it connects to punitive damages. Because obviously the
20 failure to warn claim is out of this case.

21 Defendants' No. 3, events, documents and statements
22 that postdate implantation. To the extent the proffered
23 evidence constitutes subsequent remedial measures, I grant the
24 motion to exclude that evidence. There's one exception. And
25 that is to the remedial measures undertaken because they are

Bayes, et al. v. Biomet, Inc., et al. | 4:13-CV-00800

1 required by a governmental authority. That evidence is
2 admissible.

3 With respect to the evidence after Mrs. Bayes or
4 Mary's implantation shows that the design of the M2a-Magnum
5 was unreasonably dangerous and, again, providing there were no
6 intervening design changes, I ruled that it's admissible to
7 show strict liability defective design.

8 Now, on that, a limiting instruction may be
9 necessary as to the negligent design claim. So that -- meet
10 and confer on that as well with respect to the limiting
11 instruction issue. And if you can agree on a proper limiting
12 instruction, that will save us all some time.

13 No. 4, Biomet's deferred prosecution agreements with
14 the Department of Justice. I grant that motion *in limine*.
15 It's simply too attenuated from Plaintiffs' claims in this
16 case.

17 No. 5, the alleged risk of the M2a-Magnum that the
18 plaintiff did not experience. I need supplemental briefing on
19 this issue. As I get to the end of this, I will tell you when
20 and how much supplemental briefing because there are one or
21 two others that I need some supplemental briefing on.

22 No. 6, foreign regulatory actions, presentations and
23 communications. I grant the motion *in limine* as to foreign
24 regulatory actions. There's different legal standards in
25 other countries and that just simply invites jury confusion.

Bayes, et al. v. Biomet, Inc., et al. | 4:13-CV-00800

1 I denied the motion without prejudice as to presentations and
2 communications. That evidence is potentially relevant to the
3 existence of a strict liability design defect, but I really
4 have to see the evidence to actually make a final
5 determination on that. So if the communications or
6 presentations only go to notice, they are irrelevant if they
7 occurred long after Mary's surgeries as an example of that.

8 No. 7, DePuy Orthopedic documents. That one I need
9 supplemental briefing on as well. And there's -- like I said,
10 I will get to the timing of the supplemental briefing at the
11 conclusion.

12 No. 8, Kantor's testimony about Dr. Lewallen's
13 relationship with Biomet. I grant that motion *in limine*. The
14 appropriate mechanism for this evidence is to cross-examine
15 Dr. Lewallen as if he testifies or offered direct evidence of
16 a financial conflict of interest. And opinion expert from an
17 opinion such as this would be inappropriate.

18 So that said, if Biomet opens the door by asking
19 Kantor about Dr. Lewallen's medical findings, then you are
20 probably going to open the door to this type of evidence.

21 No. 9, the pretrial discovery disputes,
22 confidentiality designations, attorney-client privilege
23 designations. I grant the motion *in limine* as to the
24 attorney-client privilege designations and confidentiality
25 designations that have been made in this case. In other

Bayes, et al. v. Biomet, Inc., et al. | 4:13-CV-00800

1 words, to the extent you have designated something
2 confidential under the protective order, in this case I am
3 granting that.

4 And then I'm going to issue a general instruction
5 that the jurors should disregard the redactions.

6 No. 10, Zimmer's merger with Biomet and related
7 payments. I grant that motion *in limine* other than to the
8 extent it's necessary for context. So, for example, if a
9 witness has identified him or herself in a video deposition
10 and you are playing that video deposition and they say, who do
11 you work for, I work for Zimmer Biomet, that's -- to explain
12 why they are doing that, you can explain that, that evidence
13 of the merger. But otherwise, the evidence of the merger is
14 too attenuated from the issues in this case.

15 Defendants' No. 11, compensation paid to Biomet's
16 experts in other cases. I deny that motion *in limine*. The
17 plaintiffs should be allowed to cross-examine the experts
18 regarding any pecuniary interest.

19 So that covers all of the defendants' motions. I
20 will get the plaintiffs' motions next.

21 Plaintiffs' motion *in limine* No. 1, with respect to
22 state of the art. I deny that motion *in limine*. The state of
23 the art is relevant to Biomet's standard of care for the
24 negligent design claim.

25 Further, the plaintiffs could open the door to the

Bayes, et al. v. Biomet, Inc., et al. | 4:13-CV-00800

1 state of the art evidence even for the strict liability claim
2 by suggesting that Biomet should have incorporated safety
3 features that were not available or feasible at the time. And
4 as basis for my ruling I cite *Adams v. Fuqua, F-U-Q-U-A,*
5 *Industries, 820 F.2d 271.*

6 Plaintiffs' motion No. 2, improper expert opinion.
7 So that had two components to it. A, expert testimony by
8 treating physicians not specifically disclosed as expert. I
9 need supplemental briefing on that in two ways. Number one,
10 with respect to -- I need some cases on point. The cases you
11 cited me on that are on similar issues, but I don't have
12 one -- nobody cited a case, and I can't believe that this
13 issue has not come up before, where the disclosure was, all
14 right, I am disclosing the other side's treating physicians as
15 experts and then nothing further in terms of what the opinion
16 is or what have you. If there are cases out there, I want you
17 to find them for me and get them on the facts of this. But I
18 looked at the cases you cited and they just weren't right on.

19 Then the other issue on that is the issue of
20 prejudice. And is there a prejudice by virtue of -- assuming
21 there was an improper or insufficient disclosure, was there
22 prejudice. So I need you to address that for me, too.

23 So Plaintiffs' motion *in limine* No. 2, B as in
24 bravo, testimony regarding alternative causes of Plaintiffs'
25 injuries not supported by expert testimony. I rule that

Bayes, et al. v. Biomet, Inc., et al. | 4:13-CV-00800

1 Biomet's experts are allowed to opine on alternative
2 causation. So I deny that motion.

3 No. 3, Mary's conduct post surgery and evidence of
4 Dr. Martin's placement of cup. I deny the motion as to Mary's
5 post-surgery conduct. And then with respect to the
6 implantation or the alleged implantation of the hip
7 replacement cup at an improper angle, I deny that motion
8 *in limine* as well. Biomet is allowed to present evidence and
9 argument that Dr. Martin's improper or alleged improper
10 placement of the cup was the sole cause of Mary's injuries.

11 Motion *in limine* -- Plaintiffs' motion *in limine*
12 No. 4, Mary's Facebook message blaming Dr. Martin. I deny
13 that motion *in limine*. The Facebook post is admissible as a
14 statement of a party-opponent and it's relevant to witness
15 credibility and to the extent Mary now attributes her injuries
16 to something else, i.e., a design effect.

17 Plaintiffs' motion *in limine* No. 5, the failure to
18 preserve the left implant. I deny that motion *in limine*.
19 Biomet should be able to ask Plaintiff why the implant was not
20 preserved. Likewise, Plaintiff should be allowed to ask
21 Biomet why Biomet did not preserve the implant.

22 It's my understanding that Biomet -- when there's a
23 revision surgery, Biomet is given notice of that in advance
24 and has the opportunity to have someone present. So I think
25 it goes both ways on that.

Bayes, et al. v. Biomet, Inc., et al. | 4:13-CV-00800

1 No. 6, motion No. 6, allegations of malpractice
2 without determination of fault. I grant the motion *in limine*
3 to the extent there's unproven malpractice allegations that
4 would be used as character evidence. I will allow testimony
5 for purposes of impeachment but exclude any reference to the
6 fact that the testimony came in a malpractice action. I
7 believe this is only with respect to Dr. Lux, but if it's with
8 respect to others, same thing.

9 Unless there was a malpractice verdict, because I
10 think if you have an issue of a claim of malpractice against a
11 doctor, there's lawsuits filed and then lawsuit is settled,
12 well, that's not necessarily evidence that there was
13 malpractice. But if there's a verdict and that verdict is
14 affirmed on appeal that there is malpractice, that's a
15 different situation.

16 So if we are talking about a verdict situation on
17 malpractice, I need you to explain that to me. At the time we
18 can discuss that, that's one of those issues in the morning we
19 can discuss. Because my guess is that none of them involves a
20 verdict that was of malpractice and so it may be a nonissue.
21 But if there is such a situation, then we will address that
22 one of the mornings before trial.

23 Plaintiffs' motion *in limine* No. 7, Biomet's good
24 deeds or corporate philanthropy. I deny that motion *in limine*
25 without prejudice. The corporate deeds evidence is admissible

Bayes, et al. v. Biomet, Inc., et al. | 4:13-CV-00800

1 only to the extent it relates to the M2a-Magnum and not to
2 show general good character.

3 No. 8, healthcare costs and insurance as a
4 collateral source. I deny that motion *in limine* as Missouri
5 Revised Statute 490.715 provides -- 715.5 provides that the
6 parties may introduce evidence of the actual cost of the
7 medical care or treatment rendered to the plaintiff or patient
8 whose care is at issue and so therefore the -- that evidence
9 is admissible.

10 I find that that statute is procedural and therefore
11 can be applied retroactively and cite for the record a couple
12 of cases on that.

13 J.B., B as in Bravo, by and through Bullock v.
14 Missouri Baptist Hospital of Sullivan, which is
15 No. 4:16-CV-1394-ERW, 2018 Westlaw 746302. And *Norman v.*
16 *Textron, Inc.*, it's 2018 Westlaw 3199496.

17 No. 9, the litigation crisis, the one motion
18 *in limine* you all agreed on. So thank you for that. I grant
19 the unopposed motion.

20 No. 10, the effect of the FDA clearance. I've
21 ordered additional briefing on that issue already, so I'm
22 going to defer the ruling on that motion until I've reviewed
23 that additional briefing.

24 No. 11, the adequacy of the label on Dr. Martin's
25 readings of the instructions for use. So I'm granting this in

Bayes, et al. v. Biomet, Inc., et al. | 4:13-CV-00800

1 part and denying it in part. I am going to allow Biomet to
2 introduce the surgical technique, but I am granting the motion
3 *in limine* as to any evidence that Dr. Martin did not read the
4 instructions for use.

5 I grant the motion *in limine* as to evidence or
6 testimony regarding the adequacy or inadequacy of the
7 warnings. Biomet should be allowed to introduce the warnings
8 to rebut the conscious disregard issue for purpose of punitive
9 damages.

10 So that's all the rulings on those. So to the
11 extent I've asked for supplemental briefing, other than with
12 respect to the FDA clearance because I already gave you a
13 deadline for the FDA clearance, I need supplemental briefing
14 of no more than a total of seven pages per side, not per issue
15 but per side. So, Plaintiff, yours is going to be a total of
16 seven pages. Defendants, yours is going to be a total of
17 seven pages, submitted simultaneously by the close of
18 business, or 5:00 p.m. rather, on September 28 of 2020.

19 So that's motions *in limine*.

20 Next up, jury instructions. So you've agreed on
21 some jury instructions. Thank you. I appreciate that.

22 In light of the rulings on today's motion *in limine*,
23 I think there's probably opportunity for further agreement on
24 the jury instructions. So I order you to meet and confer.

25 I think, Mr. Schanker and Mr. Mandler, you know that

Bayes, et al. v. Biomet, Inc., et al. | 4:13-CV-00800

1 when I am ordering you to meet and confer, I'm ordering the
2 two of you to talk and not just delegate this to others, to
3 submit a joint statement on any additional agreed instructions
4 and to provide separate proposed instructions where
5 disagreements remain. And I need that by 5:00 on
6 September 30. 5:00 p.m. that is.

7 And then I'll address issues with respect to areas
8 of disagreement on jury instructions, to the extent there are
9 any, for the initial instructions to the jury, not for the
10 final instructions, but for the initial instructions to the
11 jury, at our conference at 8:00 a.m. on October 5.

12 Exhibits. So speaking of meeting and conferring,
13 you will be meeting and conferring a bit more. I am
14 disappointed again by the volume of objections to the trial
15 exhibits. Again, hundreds and hundreds of exhibits to which
16 there are objections and then the objections are -- they are a
17 myriad of objections to each of these exhibits. And they are
18 just kind of one-word or two-word objections. Okay. That's
19 fine, if we were in the courtroom in front of the jury, those
20 are what you would do but not particularly informative for me
21 to rule on them. And there are simply too many of them still
22 hanging out there for me to deal with in an orderly fashion
23 before trial.

24 So, Mr. Schanker, Mr. Mandler, you are the lucky
25 winners of another meet and confer on those to get those

Bayes, et al. v. Biomet, Inc., et al. | 4:13-CV-00800

1 resolved. And resolve as many of them as you can and get them
2 down to their essence of which exhibits are you really
3 objecting to and what is the basis or the bases on which you
4 are actually objecting to those exhibits.

5 My sense is that -- and you don't have to answer
6 this, but my sense is that someone or some groups of people on
7 each side was tasked with coming up with as many exhibits as
8 you could come -- or as many objections as you could come up
9 with to the other side's exhibits and then that's what I got.
10 I got these long lists of objections to exhibits. So that's
11 not going to work.

12 So again, on that, work together on that. And
13 the -- from my perspective, I would love to see you agree on
14 all of them, but -- and I am an optimist and a glass-half-full
15 person, so I am hopeful that you can. But in the event that
16 you can't, then we're going to have to figure out how we're
17 going to deal with these.

18 And again, if there are a whole bunch of them, we're
19 just going to have to deal with them kind of on a rolling
20 basis, you know, either the morning of trial or the night
21 before or two nights before, however it works out.

22 So as part of your meet and confer, to the extent
23 you have any remaining objections, and again, you don't have
24 to have any remaining objections, but to the extent you do
25 have them, talk amongst yourselves on a proposed mechanism or

Bayes, et al. v. Biomet, Inc., et al. | 4:13-CV-00800

1 proposed order for -- not order as in a court order but a
2 proposed fashion for me to deal with those.

3 And, you know, you are both more familiar with which
4 exhibits you are going to actually use and when you're
5 actually going to use them and what is an orderly way to do
6 that and -- because if I tell you something now, my concern is
7 I'm going to tell you something that's not workable and then
8 you're going to be bending over backwards to do something that
9 really doesn't make a lot of sense to do when you already have
10 probably hundreds of things on your to-do list for trial prep
11 anyway. So I'll figure you can figure that out.

12 The deposition designations, we already talked about
13 that. Is there anything further I need to address now from
14 your perspectives on the deposition designations and how I
15 expect you to deal with them and how I expect to deal with
16 them?

17 **MR. SCHANKER:** Nothing from the plaintiffs, Your
18 Honor.

19 **MR. MANDLER:** No, Your Honor. Thank you.

20 **THE COURT:** Very good. Punitive damages, we will
21 talk about that a little bit. So we've got -- my ruling
22 denying Biomet's summary judgment motion on the punitive
23 damages is now out, and that's essentially, okay, you --
24 that's still potentially a live issue in the case. But
25 there's also an issue of the choice of substantive law on that

Bayes, et al. v. Biomet, Inc., et al. | 4:13-CV-00800

1 and whether it's going to be Indiana law or Missouri law. And
2 because this court sits in Missouri, we apply Missouri's
3 choice-of-law rules and Missouri choice-of-law rules is the
4 most significant relationship test which considers four
5 factors, which I will discuss in a moment. But I will state
6 as a preliminary matter, Missouri's formulation is essentially
7 that it establishes a presumption that the state with the most
8 significant relationship is the state where the injury
9 occurred.

10 So keeping that in mind, the four factors are,
11 No. 1, the place of injury. I assume you are in agreement
12 that the place of injury is Missouri. Is that right,
13 Mr. Schanker and Mr. Mandler?

14 **MR. MANDLER:** Yes, Your Honor.

15 **MR. SCHANKER:** Yes, Your Honor.

16 **THE COURT:** Okay. No. 2, the place where the
17 conduct-causing injury occurred, I am going to put a pin in
18 that and come back to it.

19 No. 3, the domicile, residence, nationality, place
20 of incorporation and place of business of the parties. I
21 understand that the Biomet entities that are in this case,
22 their principal place of business is in Warsaw, Indiana,
23 right?

24 **MR. MANDLER:** That's correct, Your Honor.

25 **THE COURT:** Okay. So the other piece I need to know

Bayes, et al. v. Biomet, Inc., et al. | 4:13-CV-00800

1 on that is the state of incorporation or the state of
2 organization. I know you have some corporations and some LLCs
3 in here, so I need to know that.

4 How quickly can you get me that? Is that something
5 you could have somebody look at here today and get that to me
6 before we conclude today?

7 **MR. MANDLER:** We can try. If not, certainly by
8 midday tomorrow.

9 **THE COURT:** Okay. If you can get it today, great.
10 If not, by midday tomorrow is fine.

11 Then the place where the relationship between the
12 parties is centered, are you in agreement that that is
13 Missouri?

14 **MR. SCHANKER:** Yes, Your Honor.

15 **MR. MANDLER:** I'm sorry, I missed that. I don't
16 think so, Your Honor. I would have to double check our
17 briefing, but I think we are disputing that.

18 **THE COURT:** Okay. I skimmed through your trial
19 brief again on that, Mr. Mandler, and it's not jumping out at
20 me. But have one of your folks check on that.

21 **MR. MANDLER:** I will take a look while we are
22 sitting here, Your Honor.

23 **THE COURT:** So the place where the conduct causing
24 the injury occurred, I think there's -- as I look at it,
25 there's three issues there. One is where Mrs. Bayes was

Bayes, et al. v. Biomet, Inc., et al. | 4:13-CV-00800

1 injured, which I think is undisputed that that's Missouri; is
2 that right?

3 **MR. SCHANKER:** That's correct.

4 **MR. MANDLER:** Correct, Your Honor.

5 **THE COURT:** Okay. Then the second issue is where
6 the conduct causing the injury occurred. And as I see that,
7 that has two subparts to it. So that's why I say three
8 issues.

9 So subpart A is where the decisions were made as to
10 the design of the product. And so that's one. And then the
11 other is her actual injuries. And maybe there's a third
12 subpart, which is the conduct causing the injury includes,
13 from Defendants' perspective, the improper implantation angle
14 by the surgeon. So that occurred in Missouri, right? Where
15 the surgeon implanted it is in Missouri?

16 **MR. MANDLER:** Correct.

17 **THE COURT:** Right? There's no dispute about that.
18 So then the -- with respect to where the conduct occurred with
19 respect to the design, as I understand your argument, you are
20 saying, well, that all occurred in Warsaw, Indiana because
21 that's where the corporate headquarters are. Is there going
22 to be evidence from either side that those decisions were made
23 or conduct leading to those decisions occurred elsewhere? For
24 example, Biomet used labs in Texas and Idaho and Iowa and a
25 whole bunch of other places or experts in a whole bunch of

Bayes, et al. v. Biomet, Inc., et al. | 4:13-CV-00800

1 different places to make those decisions.

2 Is there anybody -- going to be any evidence as to
3 that or is it simply that it occurred -- those decisions
4 occurred in Indiana?

5 **MR. SCHANKER:** Yes, there is evidence, Your Honor,
6 they occurred in a variety of places. For example, one of the
7 designers, Dr. Cuckler, his residence is in Florida and his
8 office was in Alabama. And there's several others were
9 involved in the design of the hip that are not located in
10 Indiana.

11 **MR. MANDLER:** But the design data information he
12 gave was delivered to Indiana, it was considered in Indiana.
13 He came to meetings in Indiana. All of the design actually
14 took place in Warsaw, Indiana.

15 **THE COURT:** All right. So your argument is that
16 wherever it all happened, it all funneled up to Indiana and
17 that's ultimately where the decisions were made?

18 **MR. MANDLER:** Yes, Your Honor.

19 **THE COURT:** Okay. I understand. Mr. Mandler, when
20 you have answers on the questions I asked, let me know.

21 **MR. MANDLER:** Okay.

22 **THE COURT:** Very good. There's another question
23 with respect to punitive damages, the net worth. And I
24 already held that with respect to Biomet's net worth, it will
25 be admitted only if during Plaintiffs' presentation I

Bayes, et al. v. Biomet, Inc., et al. | 4:13-CV-00800

1 determine that a submissible case for punitive damages has
2 been made. You then ask the question, okay, if I am going to
3 allow that, when and how am I going to allow that. I have not
4 yet determined that. So that one I am still taking under
5 advisement.

6 **MR. SCHANKER:** Thank you.

7 **THE COURT:** The next issue I have is spoliation of
8 evidence. There's a -- there's the failure to preserve issue
9 and I think I've addressed that already in a sense in terms of
10 the motion *in limine*.

11 Is there a further issue on spoliation? I know I
12 already ruled on the issue of the affirmative defense and
13 ultimately Biomet agreed that it is not an affirmative
14 defense, so there is no affirmative defense on that.

15 So where are we on that issue otherwise aside from
16 what I've ruled on the motion *in limine*? I will look to you
17 first, Mr. Mandler.

18 **MR. MANDLER:** Yeah, we'll present the evidence on
19 the issue as Your Honor outlined earlier when you denied the
20 motion *in limine* on it and then we will ask for an instruction
21 once the evidence is in front of the Court.

22 **MR. WOOL:** Your Honor, Zachary Wool on this issue.
23 Because of the posture, Biomet has already put forth its best
24 evidence that Mrs. Bayes intentionally destroyed or did not
25 preserve the hip with an intent to deprive Biomet the device.

Bayes, et al. v. Biomet, Inc., et al. | 4:13-CV-00800

1 And in the cases that we cited in our papers, the
2 court has discussed that there's an attempt to brand her as a
3 bad actor, as a spoliator. If Biomet fails to do that,
4 Your Honor, does not instruct them on the spoliation
5 instruction, the jury will have then heard all of this
6 evidence about her lack of preserving the hip that might not
7 be able to be cured by an instruction, a curative instruction,
8 Your Honor, to disregard that evidence that's been heard. You
9 can't unring the bell.

10 And since the evidence has already been put forward
11 because of the posture they originally raised as an
12 affirmative defense, we briefed the summary judgment motion on
13 it, Your Honor has the evidence, the best evidence of intent
14 in front of the Court and should be able to decide the issue.

15 **MR. MANDLER:** That's just a repeat of the argument
16 on their motion *in limine* that you've denied. You said both
17 sides get to ask the opposing side why didn't she keep it. We
18 will explore that. I mean, there's even more evidence that we
19 have now that Your Honor has ruled that the Facebook page can
20 come in.

21 We can ask Dr. Lux if he talked to Mrs. Bayes about
22 the Facebook page. That might be a reason they didn't keep it
23 because they thought they already knew the reason that it was
24 because it was put in an abducted position.

25 **THE COURT:** As I understand this issue, it's a

Bayes, et al. v. Biomet, Inc., et al. | 4:13-CV-00800

1 little bit like the scarecrow in the Wizard of Oz and each
2 side is pointing at the other and saying, well, no, you failed
3 to preserve it, no, you failed to preserve it.

4 So I certainly understand your point, Mr. Wool, but
5 I think that what you have argued is subsumed in my motion
6 *in limine* ruling on that. So I don't -- I'm not going to
7 further address it at this point in the case. And then if we
8 get to the point of an instruction on it, we will talk about
9 it then and you will submit to me your positions on it at that
10 point.

11 Okay. Other similar incident evidence. I talked
12 about this a little bit earlier. So the Eighth Circuit
13 standard is that it's substantially similar and I mentioned
14 that there's going to be offer of proof. Obviously that's
15 going to be outside of the presence of the jury on that.

16 Are there any questions on that at this point?

17 **MR. MANDLER:** No, Your Honor.

18 **THE COURT:** Mr. Schanker?

19 **MR. SCHANKER:** No, sir.

20 **THE COURT:** All right. I already talked about the
21 relevance of warnings and marketing materials.

22 Routine communications and business records, the
23 hearsay exception. This is something I believe the defendants
24 asked about in their submission. And it was: Do all routine
25 communications, routine e-mails fall within the business

Bayes, et al. v. Biomet, Inc., et al. | 4:13-CV-00800

1 records hearsay exception?

2 Mr. Mandler, just briefly give me a little bit more
3 on that issue.

4 **MR. MANDLER:** We are also -- if it would be at all
5 helpful, we can do a supplemental brief or include it in our
6 briefing because we have a pocket brief on it.

7 The leading case on it is from the Chinese drywall
8 litigation down in Louisiana. In essence what the judge ruled
9 there is just because it's an e-mail doesn't make it a
10 business record. It's -- an e-mail is no different than if I
11 walked down the hall and talked to Andy. That doesn't make it
12 a business record. Still it's a way of communication just
13 because it's written.

14 It still has to meet the criteria that it's kept in
15 the regular course of business to show some regular activity
16 of the witness. So the fact that you're e-mailing back and
17 forth doesn't, per se, make it a business record. You still
18 have to meet the other elements to get around hearsay for that
19 communication.

20 **THE COURT:** Right. So why don't you address that in
21 your supplemental briefs, both of you.

22 **MR. MANDLER:** We will, Your Honor.

23 **THE COURT:** Is there -- before I say that, let me
24 ask Mr. Schanker. Is there an issue as to this?

25 **MR. SCHANKER:** Yes, Your Honor. I think it should

Bayes, et al. v. Biomet, Inc., et al. | 4:13-CV-00800

1 be addressed.

2 **THE COURT:** Okay. Then do it in the supplemental
3 briefs.

4 Okay. The implied warranty claim is the next thing
5 I want to talk about. That's still a claim in the case. It
6 really was not addressed terribly robustly, I'll say, in the
7 summary judgment briefing on this and -- or really in the
8 trial briefs. I know you've submitted proposed jury
9 instructions on that. Is that issue still in the case and if
10 so, is it -- is it -- am I correct to read that it's an
11 implied warranty of merchantability?

12 **MR. SCHANKER:** That is correct, Your Honor. It's
13 still a cause of action that we are pursuing.

14 **THE COURT:** Okay. All right. The collateral source
15 rule, I addressed that in the motion *in limine* rulings. I
16 think in one of the -- in your joint submission, you mentioned
17 that you were working out a stipulation on that. I probably
18 should have asked you at that point.

19 But have you reached a stipulation on that issue?
20 And if not, will my motion *in limine* ruling on that facilitate
21 the reaching of a stipulation on that?

22 **MR. MANDLER:** The second one.

23 **MR. SCHANKER:** I think your ruling will certainly
24 assist, Your Honor.

25 **THE COURT:** Okay. Very good.

Bayes, et al. v. Biomet, Inc., et al. | 4:13-CV-00800

1 And then in your trial brief, Mr. Mandler, you spend
2 quite a bit of time on reptile tactics. But as I see it,
3 there was no motion on that.

4 **MR. MANDLER:** Well, we only -- we were limited to
5 15 pages of omnibus motion and so we chose our topics wisely.
6 I think our thought is to inform the Court on those issues and
7 we will object at trial if we need to and the Court can take
8 them up unless you want to address it in some other manner.

9 **MR. SCHANKER:** Your Honor, we plan on following the
10 rules of evidence.

11 **THE COURT:** Yeah, and I expect you to follow the
12 rules of evidence. And to the extent, if at all, you are
13 going to argue or question about kind of vague standards that
14 aren't the law of this case, I am not going to allow that. So
15 I'm not going to prejudge whether you're doing that or not,
16 but so you know, I'm not going to allow that.

17 The evidence that's going to be admissible in this
18 case, the questioning that's going to be permissible in this
19 case is going to be based on the Federal Rules of Evidence and
20 the facts of the case --

21 **MR. SCHANKER:** Absolutely.

22 **THE COURT:** -- and the legal standards that apply to
23 this case.

24 **MR. SCHANKER:** Absolutely.

25 **THE COURT:** All right. My list of miscellaneous

Bayes, et al. v. Biomet, Inc., et al. | 4:13-CV-00800

1 issues. The use of video depositions for impeachment. So I
2 talked with you at one of the pretrial conferences about if
3 you are going to have video testimony, have it ready to go,
4 push a button, right.

5 So with respect to video deposition, use of video
6 depositions for impeachment, I recognize it's a little
7 different than just -- than presenting a witness by video and
8 there's little different dynamics and you need a little bit of
9 time. But by where you are in this case, I expect that you
10 pretty much know where you think you are going to get
11 something impeachable or not. And of course, one never knows
12 when a witness is going to say something that is impeachable.

13 But on the use of video for impeachment as opposed
14 to use of the paper transcript, I am going to apply a
15 20-second rule. And that is if you can get your video up
16 within 20 seconds, great, you can use it for impeachment. If
17 you cannot get it up within 20 seconds, then you need to use
18 the paper transcript. And again, have that ready to go.

19 So the next issue I had is the left hip tissue
20 slide. And I believe Biomet, you're asking for the -- access
21 to Mary's left hip slide for scanning to use with presentation
22 software.

23 Has this issue been resolved?

24 **MR. MANDLER:** It has not. We were unable to resolve
25 it. We talked about it several times, Your Honor. And as I

Bayes, et al. v. Biomet, Inc., et al. | 4:13-CV-00800

1 understand the plaintiffs' concern is that they do not want
2 Dr. Bauer to issue any new expert opinions. We absolutely
3 agree. We stipulated it's not for new opinions. It's merely
4 for presentation to the jury.

5 Because of his restrictions at his hospital, he is
6 going to be testifying remotely. He has a software package.
7 When they sent the slides initially, he took a scan of the
8 right. He just simply forgot or neglected to take one of the
9 left so we could show it to the jury. We asked, we said, if
10 you overnight it to us, we'll pay both directions, we'll send
11 it back within 36 hours. It's just so he can scan it so he
12 can explain his testimony to the jury. Nothing more.

13 **THE COURT:** I understand. Mr. Schanker.

14 **MR. SCHANKER:** Your Honor, Dr. Bauer has the
15 photographs that he utilized to render his opinions at the
16 time, his expert opinions including of the left hip. And
17 that's the information he should be relying on.

18 The concern in this situation is now he wants
19 additional information that apparently was not -- it wasn't
20 part of his expert report in this case and clearly can enhance
21 his expert testimony at this point in time. And so it's
22 simply our position that he needs to ride with the horse he
23 was on at the time he did his expert designation.

24 **THE COURT:** Well, he's not going to be able to offer
25 new opinions on anything he hasn't already opined on. I'm

Bayes, et al. v. Biomet, Inc., et al. | 4:13-CV-00800

1 certainly not going to allow that. And if, in fact -- you
2 know, if he testifies that he simply forgot to take pictures
3 of this, I need to allow him to use it and then allow you to
4 cross-examine him on that, well, why didn't you take pictures,
5 you know, whatever you are going to do cross-examination wise
6 on that. If you believe it somehow impeaches his credibility,
7 you can use that. But I'm going to allow it. So now the
8 question is how, how do we facilitate this?

9 **MR. SCHANKER:** Your Honor, I think I did a poor job
10 of explaining. We had a chance to cross-examine him in the
11 form of a deposition on these very pictures, the pictures that
12 he relied upon at the time. We don't have that chance -- and
13 then to prepare accordingly. Now he's going to have new
14 pictures, enhanced pictures.

15 And these are very complex issues that any
16 layperson, we can't understand when you -- you've seen
17 pathology presumably, Your Honor, and to try to make heads or
18 tails of it. And so there is no way that we can have our
19 experts prepare us for this and so it's truly trial by ambush.

20 We had our opportunity to take his deposition and to
21 go through this and now they get a second bite at the apple
22 and, quite frankly, there's a potential for extreme prejudice
23 here.

24 **MR. MANDLER:** Your Honor, these aren't new pictures.
25 It's the exact same slide. There's a single slide. All it is

Bayes, et al. v. Biomet, Inc., et al. | 4:13-CV-00800

1 is to present that slide. Mr. Schanker has had that slide
2 whatever -- since it was taken at the time of the surgery
3 since 2011. We've had -- Dr. Bauer had it for a matter of
4 days. He just didn't scan it.

5 There's a single slide. It has nothing to do with
6 pictures or taking pictures or opinions. He wants to load the
7 slide into his presentation software. Nothing more.

8 **THE COURT:** Okay. I'm going to allow it, so the
9 question is -- and allow you to cross-examine him on it,
10 Plaintiff. How are we going to facilitate this?

11 **MR. MANDLER:** I think we can meet and confer and
12 work it out. We will give them a FedEx number and they can
13 ship it.

14 **THE COURT:** Okay. All right. Mr. Schanker, you
15 asked about the use of an easel. And then I think there was
16 something about remote witnesses needing to see it. To me
17 there's an issue of the remote witnesses being able to see it.
18 So tell me what the issue is.

19 **MR. SCHANKER:** It was just sort of teeing up issues
20 that you've already covered, Your Honor. And as much as --
21 practically speaking with the jury back here, probably isn't
22 going to be practicable to be using an easel with jurors
23 everywhere and a witness up here. So we will just work
24 through those issues.

25 And then similarly with our tech folks, if we use

Bayes, et al. v. Biomet, Inc., et al. | 4:13-CV-00800

1 the ELMO and we have a remote witness on Zoom, I think there's
2 technology that can take that into account. Those will be
3 issues just practically that we will work through with the
4 technology.

5 So I don't have any particular question concerning
6 that unless my comments raise some for you that you would like
7 me to address.

8 **THE COURT:** No.

9 **MR. SCHANKER:** Okay.

10 **MR. MANDLER:** Nothing more, Your Honor.

11 **THE COURT:** All right. And I have to give my
12 apologies to L. Frank Baum because I believe it was the
13 scarecrow, not the tin man.

14 All right. Mr. Mandler, were you able to get the
15 places of incorporation or organization of the entities?

16 **MR. MANDLER:** Okay. I believe so, with the
17 exception of there's an LLC they are still trying to track
18 down if you want the actual members of the LLC, but --

19 **THE COURT:** Well, what I need on the LLC is the
20 place of organization of the LLC. Is it an Indiana LLC? Is
21 it a Delaware LLC? Is it a somewhere-else LLC? I don't know
22 that I need the members.

23 **MR. MANDLER:** Okay. So I will give you that then,
24 if you are ready.

25 **THE COURT:** Yeah, I am ready.

Bayes, et al. v. Biomet, Inc., et al. | 4:13-CV-00800

1 **MR. MANDLER:** Biomet, Inc., the principal office is
2 in Warsaw. The jurisdiction of formation is Indiana.

3 Biomet Orthopedics, LLC, the principal office is in
4 Warsaw, Indiana. The jurisdiction of formation is Indiana.

5 Biomet U.S. Reconstruction, the principal office is
6 Warsaw, Indiana and the jurisdiction of formation is Indiana.

7 Biomet Manufacturing Corp, the principal office is
8 Warsaw and the jurisdiction of formation is Indiana.

9 I'm told the source of the information is the
10 Indiana State Secretary of State, the registration there.

11 **THE COURT:** All right. Very good.

12 Mr. Schanker, if for some reason you believe that
13 information is inaccurate, I expect you will point that out to
14 me by no later than when -- you have something due on 5:00 on
15 Monday, right? So I'll have you do that by no later than
16 5:00 on this coming Monday.

17 So that -- I think that other piece is then the
18 place where the relationship between the parties is centered.
19 So you are going to address that for me.

20 **MR. MANDLER:** I looked at the briefing. I didn't
21 find anything, as you didn't, quickly in the briefing. I
22 would just argue that it's a mutual exchange between all the
23 Biomet defendants who are centered in Indiana and Mrs. Bayes
24 and her doctor who are centered in Missouri.

25 So it's -- the relationship is the development of

Bayes, et al. v. Biomet, Inc., et al. | 4:13-CV-00800

1 the product and the sale of the product to her, so it's
2 somewhere between those two states. So I don't think it's
3 definitive one way or the other and that's why I didn't agree
4 with Your Honor when you said it's only Missouri. I think the
5 relationship is centered between those two states.

6 **THE COURT:** I don't think I really need to get into
7 the supply chain of this, but -- so, yeah, Biomet is in
8 Indiana. Dr. Martin is in Missouri; right?

9 **MR. MANDLER:** Right.

10 **THE COURT:** And the implant surgery occurred in
11 Missouri. So the product ultimately makes its way to Missouri
12 before it's implanted in Mrs. Bayes; right?

13 **MR. MANDLER:** Correct.

14 **THE COURT:** Okay. And whether it comes from Indiana
15 or not, I don't know if that's real material because it may
16 not -- is it manufactured in Indiana? Your colleague is
17 shaking her head.

18 **MR. MANDLER:** I understand that it is, yeah. Their
19 primary manufacturing facilities are in Indiana.

20 **THE COURT:** All right. So it's manufactured in
21 Indiana. It's shipped to Missouri. I assume these are
22 shipped directly to the hospital where the implantation is
23 occurring.

24 **MR. MANDLER:** Correct. And there's a buyer/seller
25 relationship between Biomet in Indiana and the doctor or the

Bayes, et al. v. Biomet, Inc., et al. | 4:13-CV-00800

1 hospital in Missouri.

2 **THE COURT:** Right. And then there's a sales rep,
3 right, a Biomet sales rep?

4 **MR. MANDLER:** Correct.

5 **THE COURT:** Right? And that person, I don't know
6 whether that person is stationed in Indiana or Missouri or
7 somewhere else.

8 **MR. MANDLER:** They all have a territory and it
9 doesn't necessarily equate to one state or one geography. It
10 will depend. We'd have to look up the facts. I don't know
11 the facts of this particular sales rep.

12 **THE COURT:** Right. It's like the circuits within
13 the United States; they just kind of are what they are.
14 Right?

15 **MR. MANDLER:** Yes.

16 **THE COURT:** So -- but there's a sales rep and the
17 sales rep meets with Dr. Martin. I read a number of things
18 that the sales rep had met with Dr. Martin several times.

19 **MR. MANDLER:** Correct. The sales rep doesn't --
20 it's not someone where they take ownership of -- it's not like
21 a dealer. They don't take ownership of a -- they are just
22 repping the product.

23 **THE COURT:** I understand how medical sales reps
24 work. They go call on the doctors and say, here's my product
25 and here's what you should use, whether it's a pharmaceutical

Bayes, et al. v. Biomet, Inc., et al. | 4:13-CV-00800

1 or whether it's a medical device, and they try to get the
2 doctor to either prescribe it or to use it, right? But they
3 are calling on the doctor.

4 Is there any evidence in this case that Dr. Martin
5 had any interaction with Biomet other than in Missouri? For
6 example, did Biomet bring Dr. Martin to product conferences or
7 what have you, whether those were in Indiana or in Tahiti for
8 that matter?

9 **MR. MANDLER:** Not that I'm aware of, Your Honor.

10 **THE COURT:** Is there any other evidence with respect
11 to relationship, meetings, etc., contacts between Biomet and
12 Dr. Martin that occurred anywhere other than in Missouri?

13 **MR. MANDLER:** Not that I'm aware of.

14 **THE COURT:** All right. I'm obviously taking that
15 issue under advisement. I'm giving you the opportunity just
16 to address the issue of those places of incorporation and
17 organization and the principal places of business. I think
18 the principal places of business are not disputed, if I
19 understand that. I think that's -- nobody disputes that it's
20 in Warsaw, Indiana; right?

21 **MR. SCHANKER:** Correct, Your Honor.

22 **THE COURT:** All right. Now, that, I believe, is all
23 the issues I have. And I believe I've addressed all of the
24 issues that you presented to me in your joint submission. But
25 if I missed something in that regard, I'm sure you are going

Bayes, et al. v. Biomet, Inc., et al. | 4:13-CV-00800

1 to tell me that.

2 So that said, Mr. Schanker, A, did I miss any issue
3 that you presented to me in your joint submission?

4 **MR. SCHANKER:** Your Honor, I'm just checking. I
5 believe you got all the issues that we had in our joint
6 submission, so thank you for that.

7 I just have one other point of clarification and
8 that was concerning the disclosure of exhibits for anticipated
9 witness, and you clarified 48 hours for the witness and then
10 we --

11 **THE COURT:** Well, two business days.

12 **MR. SCHANKER:** Yes.

13 **THE COURT:** Make sure we're clear on that. Because
14 I don't want the weekends to be kind of following that up. So
15 it's two business days.

16 **MR. SCHANKER:** Thank you for the clarification.

17 And then there had been discussion previously about
18 time for exhibits and disclosure of the exhibits that we are
19 going to use with that witness. And obviously being flexible
20 and adaptable, we understand that we will follow that rule.

21 And just practically speaking, we brought this up
22 before. As you know, the testimony today changes what happens
23 to my witness tomorrow morning, even though I prepared for
24 that witness and disclosed him or her a day and a half ago.
25 And so it doesn't seem practicable to be disclosing exhibits

Bayes, et al. v. Biomet, Inc., et al. | 4:13-CV-00800

1 far ahead.

2 And we would propose that those exhibits be
3 disclosed -- as we've done in previous trials just like this,
4 that those exhibits be disclosed at 8:00 p.m. the evening
5 before and then they can be addressed -- we are fine with
6 bright and early, too, Your Honor, they can be addressed
7 before court if there's any objections.

8 **THE COURT:** Yeah, we talked about that before at the
9 pretrial conference and one of the things I told you was the
10 rule of reason applies on some of these things, right, and we
11 have to be reasonable with each other and with me, of course.

12 Mr. Mandler, looked like you wanted to say
13 something, so go ahead.

14 **MR. MANDLER:** We did address that and you did rule,
15 Your Honor. You said it was going to be 24 hours. We
16 actually built that into one of our stipulations with the
17 may-use exhibits. You were disappointed that we had that many
18 objections to the will-use exhibits.

19 One of the reasons there weren't more objections is
20 we carved out the may-use exhibits separately and said we will
21 deal with those 24 hours in advance. So at a minimum, I would
22 ask the Court to keep with your original ruling of 24 hours.
23 I would be in favor of doing it 48 hours, but if counsel
24 doesn't think that's possible, at a minimum I would say let's
25 stay with the 24 hours.

Bayes, et al. v. Biomet, Inc., et al. | 4:13-CV-00800

1 **THE COURT:** Well, the reality of it is no matter
2 which I do, I hope you are getting the picture that I am
3 strongly incentivizing you to get it resolved beforehand.

4 **MR. MANDLER:** We have the picture, Your Honor.

5 **THE COURT:** Yeah. So now I certainly understand
6 what you are saying, Mr. Schanker. But at the time I wasn't
7 anticipating the number that I saw in terms of objections and
8 exhibits to which you objected. So I'm going to stick with
9 the two business days that I've said here as opposed to the
10 24 hours that I had said some time ago before I understood
11 exactly what the volume of this was going to be.

12 You look puzzled.

13 **MR. SCHANKER:** I am just trying to clarify. Because
14 understand in a case like this where there were 3 million
15 exhibits, that we have gotten down to the number that we have
16 at this point in time and it will continue to funnel down and
17 tomorrow -- you know, during trial the next day with a
18 particular witness, we may need to use five to seven to 15
19 exhibits and there may be an objection to one or two of those.
20 And hopefully we can work those out. And if not, we would
21 just be bringing you the morning of trial the handful, if any,
22 objections to exhibits. That's practically the way that I see
23 it would work.

24 And again, I just reiterate to try to -- real life
25 of trying a case, 48 -- you know, two business days before

Bayes, et al. v. Biomet, Inc., et al. | 4:13-CV-00800

1 trial to have your entire direct scripted and to believe that
2 it's not going to change when live bullets start flying just
3 doesn't seem realistic.

4 **THE COURT:** No, I think you've misunderstood me.

5 **MR. SCHANKER:** Okay.

6 **THE COURT:** I don't mean all of them two business
7 days before trial. I mean two business days before the
8 anticipated use of the exhibits.

9 **MR. SCHANKER:** Okay. But for a particular witness,
10 if I am calling an expert -- what is today? Today is
11 Thursday. So if I am calling an expert tomorrow morning, is
12 there any -- am I correct there's no requirement that I
13 disclose the exhibits -- that I tell Mr. Mandler I am using
14 these exhibits with this witness tomorrow morning?

15 **THE COURT:** What I am trying to get to is you have a
16 lot of objections to a lot of exhibits. I mean, just a
17 massive volume, frankly. And I am trying to get -- to
18 separate the wheat from the chaff, number one. The trial is
19 going to evolve, right? I know how that goes. So what you
20 use as exhibits is going to change. And it's going to change
21 not only 48 hours or two business days before, it's going to
22 change two minutes before --

23 **MR. SCHANKER:** Correct.

24 **THE COURT:** -- and during the testimony. I get all
25 of that. But what I am trying to do is deal with as many of

Bayes, et al. v. Biomet, Inc., et al. | 4:13-CV-00800

1 these objection issues outside of the presence of the jury so
2 we are not using the jury's time dealing with them. And given
3 the volume that you have presented to me, that's simply not
4 going to be possible to do it on an exhibit-by-exhibit,
5 witness-by-witness basis during the trial. We will be taking
6 up half the trial time dealing with objections to exhibits
7 based on what you've presented to me.

8 So I am trying to eliminate that. And if not
9 eliminate, substantially minimize that. So I understand what
10 you're saying, but on the other hand, exhibits aren't going to
11 be the only issues we are going to be dealing with in the
12 morning and the evening. We have the depositions, we have,
13 you know, a whole host of other issues that will come up
14 during the course of trial; right?

15 **MR. SCHANKER:** Right.

16 **THE COURT:** So I'm simply trying to streamline the
17 process so that I can deal with them in a manageable fashion
18 and I'm trying to incentivize you all to agree on as many as
19 you can. Like I said, the way I looked at the list is it
20 simply looked like somebody was tasked with just throw every
21 objection you can at this and put them in a list. Well,
22 that's all well and good, but that doesn't work for me.

23 **MR. SCHANKER:** So based on what you said, my
24 proposal would be if I have -- if I am calling a particular
25 expert tomorrow morning, we disclosed, pursuant to your

Bayes, et al. v. Biomet, Inc., et al. | 4:13-CV-00800

1 48-hour rule, that particular expert, then at 8:00 p.m.
2 tonight, I would furnish to Mr. Mandler the list of exhibits
3 that I'm planning to use with that particular expert. And if
4 there happen to be any objections to those exhibits,
5 Mr. Mandler's office can let us know. We can probably work it
6 all out. If not worked out, at whatever time the next
7 morning, Your Honor, if there's two or three exhibits that are
8 still disputed, then we can work through that issue with you.
9 I've done that in previous trials and it hasn't held it up one
10 bit and that's what I would be proposing.

11 **MR. MANDLER:** Your Honor, what Mr. Schanker just
12 said is exactly what he proposed last time. We objected to
13 it. We wanted the exhibit list and you ruled 24 hours
14 previously for -- to designate the exhibits.

15 I mean, we have folks who are going to be testifying
16 in remote locations. We have to make sure they get the
17 exhibits if they're going to be asked about them. 8:00 the
18 night before is just not going to work in a trial of this
19 nature.

20 **THE COURT:** Yeah, two business days before.

21 **MR. SCHANKER:** And just a point of clarification,
22 that does not include demonstratives that we would be using
23 with that particular witness, just the actual exhibits that
24 would be introduced; is that correct?

25 **THE COURT:** Well, if it's a demonstrative that you

Bayes, et al. v. Biomet, Inc., et al. | 4:13-CV-00800

1 are going to seek to introduce into evidence, then yes. If
2 it's a demonstrative you are simply using for demonstration
3 purposes and you don't seek to introduce it into evidence,
4 then no.

5 **MR. SCHANKER:** Thank you, Your Honor.

6 **MR. MANDLER:** Thank you, Your Honor.

7 **THE COURT:** All right. Did you have any other
8 issues, Mr. Schanker?

9 **MR. WOOL:** Your Honor, if I may seek some
10 clarification on your ruling on motion *in limine* No. 2
11 regarding marketing materials. On the defendants' proposed
12 agenda for today, it proposed -- they had some description of
13 marketing materials that was a little bit broader than the
14 motion *in limine* that was filed.

15 The motion *in limine* No. 2 deals with marketing
16 materials that the plaintiff never saw, that Dr. Martin never
17 saw. And in their description agenda for today, they included
18 marketing sales training materials, which wouldn't have been
19 for public consumption. And some of those, for example,
20 contained product characteristic statements like the hip is
21 supposed to last for 600 years.

22 So when Biomet is training its sales force on the
23 characteristics of the device, they represented to the sales
24 force that the product would last 600 years. We believe that
25 would certainly be relevant.

Bayes, et al. v. Biomet, Inc., et al. | 4:13-CV-00800

1 To the design defect claims in the case, along with
2 their other statements in the market and training materials
3 that contain critiques of competitors for not having clinical
4 trial data to support their devices. Those marketing training
5 materials we see as falling outside of this motion *in limine*
6 No. 2 and would certainly be relevant to the standard of care
7 that Biomet would have to use for the negligent design claim.
8 Excuse me, Your Honor. Would certainly be relevant to the
9 negligent design claim. If Biomet is critiquing an opponent
10 for not having clinical data to support a device, that should
11 be evidence -- that should be evidence that the jury hears for
12 the plaintiffs' negligent design claim.

13 And perhaps I poorly explained this. But in the
14 agenda items that the defendant has put forth, there's a
15 broader category of marketing materials.

16 **THE COURT:** Broader than what?

17 **MR. WOOL:** Broader than what was raised in motion
18 *in limine* No. 2. Our understanding of our reading, it's
19 publicly broadcast materials like magazine ads, TV ads,
20 materials to doctors. But what they raised in their agenda is
21 a broader than that category of documents. It's documents
22 used internally, marketing materials to train their sales
23 staff to go talk to doctors about their competitors and also
24 about their own products.

25 **MR. MANDLER:** If I may, Your Honor?

Bayes, et al. v. Biomet, Inc., et al. | 4:13-CV-00800

1 **THE COURT:** Please.

2 **MR. MANDLER:** First of all, the motion *in limine* was
3 filed before Your Honor's ruling on the summary judgment
4 motion and that's why we raised the additional item in our
5 agenda and it was one of the items that we thought, with some
6 guidance of the Court, to aid us in our meeting and conferring
7 and resolving the issues.

8 The long and short of it is without a failure to
9 warn claim, none of this stuff is relevant. I understand your
10 ruling on the motion *in limine* and we will digest that and
11 we'll work with it, but I don't think we need any more
12 guidance other than that.

13 Marketing materials to the world or to whoever, if
14 Dr. Martin didn't read it, if he didn't rely on it, we don't
15 have a failure to warn claim, has no relevance in the case.

16 **THE COURT:** I'm not going to make any further
17 rulings on that issue right now. Like I said, you can look
18 at -- consider my motion *in limine* ruling. If you, after
19 that, after you both, as Mr. Mandler says, have had a chance
20 the digest that, if there are still specific issues on that,
21 then bring them to my attention. And the question I have is
22 when is that going to become relevant? Is it going to become
23 relevant for your opening statements or is it going to become
24 relevant for your -- for your first witness, your tenth
25 witness, your 20th witness? Is it going to be relevant the

Bayes, et al. v. Biomet, Inc., et al. | 4:13-CV-00800

1 second week of trial or is it going to be day one, opening
2 statement?

3 **MR. WOOL:** Your Honor, we believe it's going to be
4 relevant for the opening statement and for some of the first
5 witnesses that we call by video.

6 **THE COURT:** All right. Well, then I need you to
7 meet and confer on this and figure out what the areas of
8 agreement are, hopefully there are many, and the areas of
9 disagreement are, hopefully there are few, and then -- I'm
10 reticent to ask for supplemental briefing on this. I've
11 already piled on some supplemental briefing for you already.
12 But I know you want to know beforehand.

13 So why don't you file a joint statement by close of
14 business on -- if you want to do it on Monday, I will look at
15 it and get you something probably by Wednesday. No guarantees
16 on that. I've got a number of other things going on next
17 week, but I will look at it. I know you need to know before
18 you start arguing to the jury.

19 So close of business Monday, submit a joint
20 statement on this issue of what you've agreed on and what the
21 issues of disagreement are and then each of you can -- if you
22 believe that there's additional case law you want me to
23 consider on that, you can cite the case law. I don't want a
24 treatise on this. I just want something concise. You know,
25 no more than three pages total for the joint submission.

Bayes, et al. v. Biomet, Inc., et al. | 4:13-CV-00800

1 Okay?

2 **MR. WOOL:** Thank you, Your Honor.

3 **MR. MANDLER:** Thank you, Your Honor.

4 **THE COURT:** All right. Anything else from
5 Plaintiffs' side?

6 **MR. SCHANKER:** Nothing else we have at this time.
7 Thanks, Your Honor.

8 **THE COURT:** Very good. Thank you. Mr. Mandler, how
9 about you from the defendants' side?

10 **MR. MANDLER:** Nothing more, Your Honor. Thank you.

11 **THE COURT:** Very good. All right. So you all --
12 like I said, you can go down to the courtroom 3 North and look
13 at that, see how -- where we are going to be doing *voir dire*.
14 Again, keep in mind where Reagan is going to be sitting for
15 that and keep in mind the parameters I have given you for
16 making sure we make a very clear record and that Reagan can
17 hear everybody and that -- part of that is going to depend
18 upon how you address the panel and doing it again in sections
19 rather than just broad-based blanket. Okay?

20 To the extent you have other technology and
21 logistics issues, again, continue to -- dealing with
22 Ms. Olliges and Ms. Miller Young and -- as you have been
23 doing. I expect that next week there will be a fair amount of
24 activity here in the courthouse for you all to get everything
25 set up, so I wish you the best. And I will see you next at

Bayes, et al. v. Biomet, Inc., et al. | 4:13-CV-00800

1 8:00 a.m. on Monday, October 5.

2 All right. We will do that -- we will do that down
3 in 3 North because that's where everybody is going to be.
4 Reagan is going to need to be down there getting set up
5 anyway. Next time I see you we will be down in 3 North at
6 8:00 a.m. on Monday, October 5.

7 Thank you. Court is adjourned.

8 (The proceedings concluded at 4:05 p.m.)

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Bayes, et al. v. Biomet, Inc., et al. | 4:13-CV-00800

CERTIFICATE

I, Reagan A. Fiorino, Registered Merit Reporter and Certified Realtime Reporter, hereby certify that I am a duly appointed Official Court Reporter of the United States District Court for the Eastern District of Missouri.

I further certify that the foregoing is a true and accurate transcript of the proceedings held in the above-entitled case and that said transcript is a true and correct transcription of my stenographic notes.

I further certify that this transcript contains pages 1 through 80 inclusive and was delivered electronically and that this reporter takes no responsibility for missing or damaged pages of this transcript when same transcript is copied by any party other than this reporter.

Dated at St. Louis, Missouri, this 24th day of September, 2020.

/s/ Reagan A. Fiorino

Reagan A. Fiorino, RDR, CRR, CRC, CCR
Official Court Reporter